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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 241

SIMEON A. BURNETTE, et al.,
Appellants,

v.

LEVIN NOCK DAVIS, et al.,
Appellees.

Appeal From The United States District Court For The Eastern District of Virginia

---

APPELLANTS' BRIEF OPPOSING MOTION TO AFFIRM

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THE QUESTIONS ON WHICH DECISION DEPENDS ARE SUBSTANTIAL AND SHOULD BE HEARD ON THE MERITS

The sole issue raised by appellees' motion for affirmance under Rule 16 is whether the questions on which the decision of this cause depends are so unsubstantial as not to need further argument (Appellees' Brief, pp. 2, 14).

The questions are substantial and they should be determined after hearing on the merits. They involve the basic problem foreseen in *Fortson* v. *Dorsey* (1965), 379 U.S. 433, 439, 13 L.ed2d 401, 405, 85 S.Ct. 498, 501, and in *Reynolds* v. *Sims* (1964), 377 U.S. 533, 578-579, 580-581, 12 L.ed2d 506, 537-538, 84 S.Ct. 1362, 1390-1391, i.e., whether a state may, when it reapportions its legislature, engage in partisan gerrymandering by combining into a single multi-member district two or more separate and independent political subdivisions, each of which is entitled by long established tradition to more than one independent representative according to the existing population ratio per representative, for the purpose or with the result of minimizing or canceling out the voting strength of racial or political elements of the voting population.

We respectfully submit that the summary affirmance of the judgment below will open the door on a nationwide scale for the employment of similar schemes to submerge all racial or political groups objectionable to those occupying the legislative seats of power. If it is constitutionally permissible for Virginia to change its long-established tradition of respect for the integrity of political subdivisions by combining Richmond City and Henrico County into a single multi-member district for the purpose or with the result of diluting or canceling out the voting strength of racial or political elements in either independent political subdivision, all the other states of the Union can effect similar combinations or arrangements to remove any racial or political group from all real participation in the legislative processes of representative, democratic government.

Since a state may legitimately construct districts along political subdivision lines to deter the possibilities of gerrymandering, as stated in *Reynolds* v. *Sims, supra,* it would seem to follow that a state may not constitutionally depart from a long-established tradition recognizing the integrity of such political subdivision lines when such departure is part of a gerrymandering scheme designed to minimize or cancel out the voting strength of racial or political elements of the voting population.

The decisions of this Court on legislative apportionment make it abundantly clear that not only is mathematical exactness or precision not a workable or attainable constitutional requirement but also that mathematics is not the sole and only criterion for determining whether a particular apportionment statute satisfies the Equal Protection Clause of the Fourteenth Amendment.

While the obvious importance of the questions involved is alone sufficient, we submit, to call for denial of the motion to affirm, we are impelled to direct attention to certain fallacies of appellees' argument and inaccuracies in their reference to facts so that the Court will not gain an erroneous impression of the record relating to the questions presented.

1. It is not a fact, and the record before this Court does not support the inference sought to be made at page 7 of appellees' brief, that the annexation proceedings brought by the City of Richmond against Henrico County on December 27, 1961, had their inception, directly or indirectly, in any act or resolution of the Board of Supervisors of Henrico County. The traditional resistance of the voters of Henrico

County to any political marriage with Richmond City was plainly illustrated by their rejection on referendum of the suggestion for merger notwithstanding its overwhelming support by the voters of Richmond City (Henrico Exhibit 20, R. 507).

2. Appellees contend that the consolidation of the city and county into a single multi-member district balanced the county's population deficiency for three delegates and the city's overage for five delegates and more nearly approached the mathematical ideal of "one person, one vote". (Appellees' Brief, p. 6). They also say that this was particularly true in view of the uncertainties as to population created by the then pending annexation proceeding, the award in which the city has since refused (Appellees' Brief, pp. 7-9; R. 657).

Appellees choose to ignore the fact that the allocation of 5 delegates to Richmond City, 2 delegates to Henrico County, and 1 floater delegate to both jointly would have solved all of those problems. The member of the House Privileges and Elections Committee resident in Richmond City who originally proposed the consolidation amendments (R. 80-82) conceded that such an allocation would have solved all the supposed problems claimed to have arisen out of the pending annexation proceeding (R. 105-106). An amendment to accomplish that exact apportionment was offered in the Senate at the 1964 Extra Session by the Senator from Henrico County and was defeated (Henrico Exhibit 14, R. 479, 480).

From time immemorial Virginia has traditionally employed the "floterial district" to take care of exactly such deficiences and overages. It was also available to take care

of the uncertainties claimed to have been created by the annexation proceedings. We have already shown the historical use in Virginia of the "floterial district" for that express purpose at pages 15-17 of Appellants' Jurisdictional Statement. This Court recognized that established Virginia tradition in footnote 2 of its opinion in *Davis* v. *Mann* (1964), 377 U.S. 678, 686-687, 12 L.ed2d 609, 615, 84 S.Ct. 1441, 1458.

The annexation proceeding pending in 1964 had nothing to do with the consolidation. It was merely an excuse.

3. The fact that Chap. 1, Acts, Extra Session 1964 (Appendix C, p. 1, with Appellants' Jurisdictional Statement) combined Chesapeake, Portsmouth and Virginia Beach into a single multi-member senatorial district, as pointed out at page 10 of Appellees' Brief, does not establish the constitutionality of that apportionment. Nor does the fact that no one has yet complained of it prove its validity. Even the affirmative approval of the affected electorate does not validate an otherwise impermissive legislative districting. *Lucas* v. *Colorado General Assembly* (1964), 377 U.S. 713, 12 L.ed2d 632, 84 S.Ct. 1472.

4. Appellees argue at pages 11-12 of their brief that the voters of Henrico County have no constitutional right to exclusive representation in the Virginia House of Delegates. That is not the question. The question is whether they can be deprived of their traditional representation as

a political subdivision by a gerrymandered change for the purpose of minimizing or canceling out the voting strength of racial or political elements of the voting population.

5. Appellees also contend "that these appellants are utterly without legal standing to raise" the questions presented (Appellees' Brief, pp. 12-13). These appellants are citizens of Virginia as well as residents of Henrico County and are affected by all aspects of the invalid scheme. It was as individual members of the class of all Virginia citizens as well as residents and supervisors of Henrico County that appellants intervened in this action. Appellees appear to concede that the class of all Virginia citizens includes *certain* residents of Richmond City and that *they*, at least, do have the right to present these questions. The scheme to dilute the voting strength of those Virginia citizens has produced a change in the appellants' traditional representation recognizing the integrity of their political subdivision. They are affected by the scheme and as Virginia citizens have the right to question its constitutional validity.

This Court had no difficulty in declaring the Virginia legislative apportionment acts of 1962 unconstitutional in their entirety upon the application of residents of Arlington and Fairfax Counties and of Norfolk City alone. We are confident that the Court will not affirm the judgment below on the ground that the appellants, though affected by the judgment, have no legal standing to appeal from it. *Bailey* v. *Patterson*, 369 U.S. 31, 7 L.ed2d 512, 82 S.Ct. 549, has no relevance here.

CONCLUSION

We again remind the Court that the Virginia reapportionment acts of 1964 still do not meet the *ideal* requirement—"one person, one vote". A majority of the Virginia Senate may still be elected by 48.2 per cent of the total population (Henrico Exhibit 3A, R. 386) and a majority of the Virginia House of Delegates can still be elected by 47.7 per cent of the total population (Henrico Exhibit 3B, R. 387).

It is respectfully submitted that the questions on which the decision of this cause depends are substantial and that they should be heard and decided on the merits.

Richmond, Virginia

July 26, 1965

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